**Wayne Stead Cadillac, Inc. *and* Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers, AFL–CIO, and Teamsters, General Truck Drivers and Helpers, No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.** Cases 32–CA–10576 and 32–CA–11004

June 18, 1991

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On January 16, 1991, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed a brief opposing the Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wayne Stead Cadillac, Inc., Walnut Creek, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has not excepted to any of the 8(a)(3) and (1) violations found by the judge.

[3] We find no merit in the Union's exception that the judge's recommended remedy and order must be corrected to include explicit reference to pension and health and welfare fund benefits which may be applicable as part of the relief due on behalf of the discriminatees in this case. We agree with the Respondent that the remedy and order are adequate in this regard because such fringe benefits are routinely includible under a make-whole order, and the language in the judge's remedy is broad enough to encompass such relief to the extent that it is appropriate in this case. See, e.g., *Best Glass Co.*, 280 NLRB 1365, 1369–1370 (1986), *Artim Transportation System*, 193 NLRB 179, 184–185 (1971). The specific nature and extent of the discriminatees' entitlements in this case are matters appropriately left to the compliance stage.

*Daniel F. Altemus, Jr.*, for the General Counsel.
*Robert Hulteng, Victor Kisch* and *Keith Sherman (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Respondent.
*David Rosenfeld (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Oakland, California, on July 16 and 18, 1990,[1] pursuant to an amended consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 32 on June 13, 1990, and based on charges filed by Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters, General Truck Drivers and Helpers, No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (collectively called Union) on September 15 (32–CA–10576) and on March 12, 1990 (32–CA–11004). The complaint alleges that Wayne Stead Cadillac, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

### Issues[2]

Whether Respondent violated the Act by terminating strikers Jerry Schrader, Terry Steely, Eric Blood, and Jeffrey Schneider, for alleged picket line misconduct, when said misconduct either did not occur or, if it occurred, was not of sufficient severity to justify discharge under the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Charging Party, and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. RESPONDENT'S BUSINESS

Respondent admits that it operates a retail new and used automobile sales and servicing business with an office and place of business located in Walnut Creek, California. It further admits that during the past year, in the course and conduct of its business that its gross volume exceeded $500,000 and during the past 12 months, it purchased and received goods or services valued in excess of $5000 from sources outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters, General Truck Drivers and Helpers, No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates refer to 1989 unless otherwise indicated.

[2] During the first day of hearing, the parties reached agreement as to certain other allegations of the complaint. The settlement agreement is herewith admitted into evidence as ALJ Exh. 1.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Union represents a unit of approximately 22 mechanics (technicians), 3 to 5 auto parts employees, 3 body men, and 2 lot people. On or about September 6, all or most employees in the unit went out on a lawful strike. During the course of the strike, participating employees picketed Respondent's business. On or about December 4, the Union made an unconditional offer to return to work. On receipt of this offer, Respondent evaluated, for the first time, certain reports of alleged picket line misconduct which had from time to time been submitted to Respondent's service manager, Steve Cook. A lengthy witness at hearing, Cook testified both for General Counsel as an adverse witness and for Respondent.

Those employees hired to replace the strikers reported to Cook perceived acts of picket misconduct. Since the replacement employees did not know the strikers' names, Cook would accompany the complaining replacement employee to the picket line usually, but not always, immediately after an incident occurred. There, the replacement employee, usually from a distance of some several feet, would point out the offending picket and Cook who knew all strikers well, would identify the alleged culprit in the informal written report of the event which he subsequently prepared.

Later, either by telephone or by written communication, Cook conveyed the report to Respondent's attorneys. The report was then filed away, with no notice of the accusation to the accused. Since most of the alleged picket line misconduct at issue in this case occurred in the first 4 to 6 weeks of the strike, affected strikers did not learn of the consequences of their alleged behavior until after the Union offered to return to work.

On or about December 14, Respondent mailed to each striker one of three form letters:

> (1) Recipient is to report to his old job on December 27;
>
> (2) Recipient's job is not then available, but person is placed on a preferential hiring list;
>
> (3) Recipient is terminated due to misconduct on picket line.

After Cook consulted with his legal advisors, Cook sent the third form letter to five strikers. One of the five has been dropped from the complaint and the remaining four are listed in the Issues portion of this decision. Before they were fired, the four strikers were afforded no opportunity to contest the charges against them. This hearing is the first opportunity they have had to contest the charges.

Before picketing began, strikers were given instructions from the Union on how to conduct themselves while picketing:

> September 5, 1989
>
> INSTRUCTION TO HANDBILLERS, PICKETS AND OTHER SUPPORTERS OF LABOR DISPUTES AGAINST WAYNE STEAD CADILLAC
>
> You are being asked to help publicize a labor dispute aimed at Wayne Stead Cadillac. To make this activity a success, your cooperation is essential. Please read these instructions and follow them carefully.
>
> 1. At all times you are to engage in peaceful and orderly activity. You are forbidden to engage in any altercation, argument or misconduct of any kind.
>
> 2. If you are picketing at Wayne Stead Cadillac, you are to obey the following:
>
> a. Picket in single file and keep moving.
>
> b. Maintain a distance of at least five (5) feet between pickets.
>
> c. Do not block, obstruct or impede entrances to or exits from the showroom or service department.
>
> 3. You may be given handbills to distribute. Please distribute handbills in a courteous manner, and if the handbills are thrown on the ground, please see that they are picked up at once and that the area is kept clean. Do not force the handbills on any person.
>
> 4. Do not threaten physical violence to the person or property of any person.
>
> 5. Do not use offensive or obscene language toward anyone.
>
> 6. Do not commit any acts of intimidation and physical violence against any person.
>
> 7. Do not damage, in any way, the personal property of Wayne Stead Cadillac, its employees, customers, suppliers, or any other persons seeking to do business with Wayne Stead Cadillac.
>
> [R. Exh. 2.]

On September 21, a supplemental memo was issued by the Union:

> September 21, 1989
>
> TO: ALL PICKETS AT STEAD OWNED STORES
>
> It is illegal to block any entrance or exit at the dealership where we are engaged in protected and lawful picket activity. Should a motor vehicle approach an entrance or exit, in the course of your picketing, please move out of the way quickly.
>
> It is the policy of our Union to exceed State and Federal laws relating to race, color, religious creed, sex, age, handicap, sexual preference, and national origin. Any derogatory reference, discriminatory remark or action, or racial epitaph will be grounds for discipline, as provided for in our I.A.M. Constitution.
>
> Please continue to picket with dignity and enjoy our constitutional right of free speech. Together, we will prevail and achieve a fair agreement with this unscrupulous employer group.
>
> Respectfully submitted,
>
> /s/ Terry L. Spitzer
> Terry L. Spitzer
> Business Representative
>
> TLS/jls
> LL 1173
>
> [R. Exh. 3.]

And on October 9, a final memo was issued:

October 9, 1989

MEMO TO PICKETERS

The dealers have made accusations that some of you have made threats which could be interpreted as threats of bodily harm. We have no reason to believe that these allegations are true. This is a word of warning to protect you and the Union. The company may discharge you if you make such threats. For this reason, please make sure that you are with someone else if there is any chance of a conversation with a replacement worker so that the replacement worker can't lie about what was said.

The company is also complaining about some obscenities on the picket line. While we have a constitutional right to express ourselves, obscenities directed at customers don't convince them that they should respect our picket line. Please refrain from such conduct.

Our instructions to you about not blocking entrances and to avoid any possibility of a comment being misconstrued as a threat are intended to protect you. We encourage you to be careful.

/s/ Terry
Terry L. Spitzer
Business Representative

TLS/jls
LL 1173

[R. Exh. 4.]

On September 20, Respondent applied for a temporary restraining order in the Superior Court of Contra Costa County. The application to restrain certain allegedly unlawful and disorderly acts of the pickets was denied for reasons which the present record does not contain (Tr. 276).

With one exception involving a telephone conversation, all other incidents in issue occurred in and around Respondent's place of business. Accordingly, I include in this decision a rough sketch of the area which was admitted into evidence.

B. *Analysis and Conclusions*

1. General principles of law governing striker misconduct

In *Chesapeake Plywood*, 294 NLRB 201, 218 (1989), the Board approved the administrative law judge's statement allocating the parties' burdens of proof in cases like this:

> Under established Board precedent, the discharge of a striker is presumptively unlawful. However, rebuttal is substantiated on the [e]mployer's showing of an honestly held belief that the striker engaged in the misconduct for which he or she was discharged. See *Rubin Bros. Footwear v. NLRB*, 203 F.2d 486 (5th Cir. 1953). Not all misconduct will suffice. The employer's burden is further refined by the requirement that the ''misconduct . . . under the circumstances existing . . . reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'' *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984); *Keco Industries v. NLRB*, 819 F.2d 300 (D.C. Cir. 1987). Having proven these elements, the burden shifts to the General Counsel to establish that the employee did not in fact engage in the disqualifying misconduct. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). [Footnote omitted.]

In *Clougherty Packing Co*., 292 NLRB 1139, 1142 (1989), the Board approved the following related statement of Board law:

> Respondent's honest belief burden does not extend to proving that a striker did in fact engage in the misconduct. To the extent that there is a lack of evidence after an honest belief has been established, the decision should be for the employer, because the General Counsel has the burden of proof to show the strikers' innocence. *Axelson, Inc*., [285 NLRB 862 (1987)]. An honest belief ''requires some specificity in the record linking particular employees to particular allegations of misconduct.'' *General Telephone Co*., 251 NLRB 737, 739 (1980).
>
> As to the sources of information on which an employer may base its honest belief, the Board has permitted the use of reports by security guards and other written reports. *Newport News Shipbuilding & Dry Dock*, 265 NLRB 716, 718 (1982); *General Telephone Co*., supra, 251 NLRB at 739; *Giddings & Lewis, Inc*., 240 NLRB 441, 447–48 (1979). Furthermore, hearsay reports by supervisors or coemployees have also been permitted.

2. The four alleged discriminatees

a. *Jerry Schrader*

Evidence with respect to two separate incidents of misconduct involving Schrader was presented at hearing. The first of these occurred on September 29. On that day, Schrader was at the home of George McClymont, a 20-year employee of Respondent who was also on strike. Schrader and McClymont had heard rumors that Rodney Beresch, a fellow striker, was going to cross the picket line and return to work. Schrader not only worked with Beresch, but also was acquainted with him and with his wife socially. In fact, Mr. and Mrs. Beresch had visited Schrader's home at least one time in the past for a party. The two families lived only about 4 or 5 miles apart. Because Beresch was one of three strikers with a special electronic skill, Schrader and McClymont were particularly concerned at the reports of his imminent return to work.

According to Schrader, he placed a call to Beresch's home about 10 to 11 a.m. for the purpose of telling him about a local mechanic's job that was supposedly available so that Beresch's financial pressures would not require him to return to Respondent's employment. Beresch was not home, but the call was answered by his wife, Margaret Beresch, who testified at the hearing. Mrs. Beresch recalls receiving the call about 4 p.m. on the day in question and recites a different version of the conversation from that provided by Schrader.

According to Schrader's version, he mentioned the available job to Mrs. Beresch, but she said her husband had decided to return to his prior job. Schrader testified that he also said Rodney's return to work could hurt us and that the members would be very upset that he went back. At this point, Mrs. Beresch asked, ''Are you threatening Rodney?'' Schrader assured Mrs. Beresch that he wasn't, but that he just wished Rodney wouldn't go back and that he'd get Rodney a job if he could.

McClymont also testified in this case. He testified that the conversation lasted about 15 minutes, although Schrader thought it was closer to 4 or 5 minutes. He listened to Schrader's side of the conversation, but could only recall Schrader saying he had a job for Rodney and that Rodney's return to work would hurt the strike.

Margaret Beresch testified that she has a listed telephone number and that when she answered the phone, Schrader identified himself and that she recognized his voice from past social encounters. Schrader first asked for Rodney but on learning he wasn't home, continued the conversation with Mrs. Beresch. Schrader asked Mrs. Beresch if it was true that Rodney was going back to work. She answered that it was. Schrader said that Rodney's return would hurt the strike. Schrader added that if Rodney wants a job, we can get him one. ''Please tell him to reconsider, because I'm afraid he could get hurt.'' At this point, Mrs. Beresch terminated the conversation. Mrs. Beresch could not recall asking Schrader, are you threatening Rodney, but she did recall Schrader leaving a message for her husband to call Schrader back.

In October, a second incident occurred involving a truckdriver named John Wyrick, an employee of Safety Kleen. According to Cook, Wyrick attempted to drive his truck through the Kazebeer Drive gate in order to perform maintenance as an independent contractor on certain of Respondent's equipment. Wyrick allegedly told Cook that Schrader, who was identified by Cook after the incident, told Wyrick not to cross the picket line or Schrader would ''fuck up his truck,'' and other pickets would follow Wyrick to other locations and ''fuck up his truck there.''

According to Cook, Wyrick left his truck in the presence of Schrader who had supposedly just threatened ''to fuck it up,'' climbed a fence—the Kazebeer Drive gate having been locked during the duration of the strike—and complained to Cook.

Schrader testified that he was walking to his car when he encountered Wyrick in his truck on Kazebeer Drive. With a picket sign in his hand, Schrader claimed to have had a friendly conversation with Wyrick about the predicament facing the truckdriver who was reluctant to enter a struck business. After Wyrick climbed the fence, he returned a short while later with Cook who opened the gate which Wyrick then drove through and subsequently performed his duties. Schrader denied making the threats attributed to him by Cook.

I find that Respondent has established its honestly held belief that Schrader engaged in the misconduct for which he was discharged.[3] That is both Rodney Beresch and Wyrick reported the events in question to Cook. However, Wyrick did not testify in this case. Accordingly, I credit Schrader's version of events involving the Safety Kleen truck. I take particular note of the improbable nature of the driver leaving his truck near the person who had allegedly threatened to damage it. I find that the General Counsel has established that this conduct did not occur.

On the other hand, I credit the version of events provided by Margaret Beresch, finding her to be more credible under all the circumstances than Schrader.[4] Essentially, I note that most of the conversation is undisputed, except, I find that Schrader told Mrs. Beresch that her husband should reconsider returning to work because he could get hurt. To ascertain whether this statement was sufficiently serious to justify termination, I turn to the cases.

Respondent directs my attention to *Georgia Kraft Co*., 275 NLRB 636 (1987), a case to which I now turn. That case was decided on the precedent of *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), where the Board stated, ''we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts.'' Rather, the Board now uses the following objective test, ''whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.''

Applying this standard, I first look to the surrounding circumstances. In the instant case, Schrader made a telephone call during the day to Mrs. Beresch, whom he knew. This is unlike the facts of *Georgia Kraft*, where two intoxicated strikers went to the nonstriker's home in the evening, cursing, threatening, and refusing numerous requests to leave. Moreover, Schrader did not curse nor refuse to terminate the call. While I would not characterize the call as friendly, I would distinguish the surrounding circumstances from those in *Georgia Kraft.*

Turning to the heart of the matter, I also distinguish the statements in *Georgia Kraft*, where the two intoxicated strikers, in the presence of his pregnant wife and young daughter, told the nonstriker that he was ''screwing them out of their God damn money'' and that the strikers would ''take care of'' the nonstriker if he returned to work. The Board held these were not ambiguous remarks in context, but were threats of bodily harm. Here I find that Schrader's statements in the context as described, and without profanity or loud or excited speech, were too ambiguous to warrant discharge. Telling Mrs. Beresch that her husband could get hurt if he returned to work, may have referred to Rodney's social relationships with Schrader with whom he had been good friends or with other strikers with whom he also had been friendly. Comparing the statement, from *Georgia Kraft*, ''We'll take care of you'' with that from the present case (Rodney) ''could get hurt'' shows a further difference in the nature of the statement even if it be deemed a threat. That is, Schrader never stated he would cause Rodney to be hurt.

Under all the circumstances here present, I find that Respondent violated the Act in its discharge of Schrader.[5]

b. *Terry Steely*

Steely was employed by Respondent as a mechanic for approximately 15-1/2 years. During the strike he was a picket captain responsible for keeping an orderly and lawful picket line.

Respondent produced a witness named Michael Lorenzo, a retired U.S. Park police officer and currently a part-time civilian employee with the U.S. Naval Reserve. As a police officer, Lorenzo patrolled in cars, on motorcycles, and on mounted horse patrol. In addition, he had experience for several years investigating major crimes.

On October 2, about 8 a.m., Lorenzo was exiting Respondent's premises at the N. Main Street driveway after having conducted a transaction at Respondent's parts department. He was riding in a two-seater sports car, engineered low to the ground. Seated next to Lorenzo was his daughter, age 8.

As Lorenzo was attempting to exit the premises, two pickets came up to the car and used their picket signs briefly to block Lorenzo's view of the traffic. As Lorenzo gestured with his hand for them to move their signs, both mouthed the words, ''Fuck You!'' Lorenzo backed up and explained to the pickets that he desired to leave. To this one of the pickets said ''Fuck You, tough shit. You came here.'' Lorenzo described his daughter as ''upset.'' Then the shorter picket grabbed his testicles with his right hand, while holding his picket sign with his left hand, and gyrated his hips back and forth, again while mouthing the words, ''Fuck You!'' On seeing this, Lorenzo's daughter asked her father, what was wrong with the person, and why is he doing that. The picket making this gesture was standing just to the right front of Lorenzo's car in close proximity to it.

After this incident, which lasted in total about a minute, Lorenzo finally exited Respondent's premises, but returned the following morning without his daughter in the car, to report the incident to Cook. The same two pickets were on the scene and were pointed out by Lorenzo. Cook identified the picket making the obscene gesture as Steely and the other

[3] In *Augusta Bakery Corp*., 298 NLRB 58 fn. 3 (1990), the Board made clear its view that an employer's failure to notify and to discharge strikers until several months after the alleged misconduct does not establish Respondent's lack of honest belief that the strikers had engaged in strike misconduct.

[4] I have also weighed in the balance Schrader's preposterous statement that he spoke to Mrs. Beresch instead of simply leaving a message for Rodney because, ''You have to know Margaret. . . . She's real friendly. She wears the pants in the family.'' (Tr. 242.) I also find that Schrader's assertion that he had a job for Rodney, or could help him get one was illusory. No one—not Mrs. Beresch nor I—could reasonably believe a striker would give up a job for which he was qualified so that another striker would take the job and not return to the struck employer. No evidence shows that Schrader took the job allegedly being offered to Rodney Beresch.

[5] The other cases cited by Respondent, *Catalytic Inc*., 275 NLRB 97 (1985), and *Massachusetts Coastal Seafood*, 293 NLRB 496 (1989), may also be distinguished on their facts.

picket as Eric Blood. In their testimony both denied they participated in the incident, although both Steely and Blood generally picketed at the same times.

Steely did admit to making the gesture in question on two occasions as ''a natural reaction to something [he] was displeased with.'' (Tr. 284.) One occasion occurred when a replacement employee drove in to work and said to Steely, ''You guys are a bunch of assholes for going on strike.'' (Tr. 285.) In response to the remark and to ''the finger'' from the same person, Steely made the gesture. Another time was in response to a driver on the street who shouted an obscenity to the strikers as he drove by.

I have little hesitation in crediting the testimony of Lorenzo, a witness who was not allied with either side in the strike. His testimony was clear and concise, as one would expect from a trained police officer. The fact that Steely has two daughters of his own does not make his version more likely as Charging Party contends; rather it makes his behavior more reprehensible.

But behavior that is reprehensible and violates the commonly accepted norms of civilized behavior is not necessarily behavior which warrants discharge. First, I note that the same objective standard applies to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Section 7 of the Act. *General Chemical Corp*., 290 NLRB 76 (1988). I find that Respondent had a reasonable belief that Steely engaged in conduct sufficiently serious to warrant discharge.[6]

Picket line conduct which is offensive, defamatory, and opprobrious may lose the protection of the Act. *Ben Perkin Corp*., 181 NLRB 1025 (1970). However, I agree with General Counsel's Brief 13, that this single, brief encounter, without physical contact or threat of violence, is not sufficient to warrant discharge. Lorenzo's daughter did not testify, so it was not possible to probe her reaction to the incident. But crediting Lorenzo's description of his daughter's reaction, I would characterize it as one of uncertainty and perhaps puzzlement at the debasement she witnessed. Yet, I did not perceive, even through the caring testimony of her father, fear, panic, or hysteria.

Yet Respondent calls my attention (Br. 20) to the case of *Southern Florida Hotel & Motel Assoc*., 245 NLRB 561 (1979), to which I now turn. There, about 2:30 p.m., a cab containing a man and a woman pulled up at a struck hotel to drop off its passengers. When the cab arrived at the hotel, a striker became agitated and yelled obscenities; finally, he unzipped his pants and exposed himself. The arriving guests observed the striker's act, as did several other persons. In upholding the discharge of the strike, the Board noted that the employer could reasonably conclude that its guests might be deeply offended by such conduct. The Board concluded that conduct by an employee intentionally designed to alienate or offend guests at a hotel is grounds for discharge.

The *Southern Florida Hotel* case predated *Clear Pine Mouldings*, supra, which contained the current standard for judging strike misconduct. However, I will assume for the sake of argument that the precedent applies to the instant case if it fits the facts. I don't find it fits the facts.

Most importantly, grabbing one's genitals through one's clothing and making the gesture described in this case is different from exposing one's self by 2-1/2 country miles. There is no reason to believe that most adults would be deeply offended at what Steely did. While the presence of an 8-year-old child in the car changes the equation considerably, I cannot find from these facts that Steely knew a child was in the car.[7]

For the reasons cited above, I find that Respondent violated the Act by discharging Steely. *Calliope Designs*, 297 NLRB 510 (1989).

### c. *Eric Blood*

This employee was employed as an apprentice technician on July 5, 1988, and worked until the strike began on September 6. Blood was accused of two separate acts of misconduct, both of which were dutifully reported to Cook by the affected replacement employees. I find that Respondent had an honestly held belief that Blood engaged in the misconduct for which he was discharged.[8]

Both incidents allegedly involving Blood occurred in October. I begin with an incident reported to Cook by Donald Paschell, a replacement employee. First some background on the complaining witness. Paschell drove back and forth to work in a Jeep, with no doors and no top. He resented, perhaps more than other replacement employees, the verbal and other harassment directed towards him by the strikers. Accordingly, after a few weeks of this, he took a piece of paper about 6 by 8 inches and with a ''Magic Marker'' wrote ''FUCK YOU'' on the sign. Then as he entered or exited Respondent's premises, he displayed the sign to the strikers who in turn reacted even more bitterly toward Paschell than they did toward other replacement employees.

The feeling was entirely mutual: Paschell testified the sign was his ''response to people telling me to get the fuck out of there, you know, if I was going [to] get fucked every day when I'd come to work . . . I was told not to harass, not to bullshit with these guys. Never in my life have I ever let anyone talk to me like that.'' (Tr. 466.)

It is not clear whether the incident with Blood occurred before or after Paschell began use of this homemade sign. In any event, Paschell was attempting to exit Respondent's premises on Parkside to drive a customer's car on a test run. According to Paschell, his exit was delayed by slow moving pickets. Finally, Paschell accelerated right as he left the driveway, when he heard a loud slap or thump on the back side of the quarter panel (fender) on the passenger side.

It wasn't and isn't exactly clear what happened. Paschell testified that after the incident, ''I didn't go on the test drive. I immediately pulled back into the lot on the North Main entrance, immediately, just shook me up. I don't know whether I'd hurt the guy, whether he'd damaged the customer's car.'' (Tr. 451.) As matters turned out there was no damage to the car and no injury to any person.

[6] In deciding to terminate Steely, Cook did not rely on Steely's use of the picket sign to block his view of traffic. Accordingly, I do not consider this conduct in my analysis.

[7] I need not determine whether customers of a new and used car sales and service business are equivalent to the customers of a hotel for purpose of the application of this case, since the case does not otherwise fit the facts of the present case.

[8] Cook did not terminate Blood for his alleged role in the incident involving Lorenzo. Accordingly, I have no occasion to examine his role, if any, in that episode.

According to Blood, on the day in question, he was on picket duty with Steely when Paschell drove his car out at a high rate of speed cutting a corner as he turned right onto the street. The car brushed Blood's backside, but did not injure him. He denied intentionally striking the customer's car. Although Blood did not report the incident to anyone, he is corroborated in his account of the incident by Steely.

Having reviewed the totality of the evidence regarding this matter, I am left with a conviction that Blood did not engage in the misconduct of which he stands accused, and I so find. More specifically, I credit Blood's account of the incident.

This does not end my inquiry as there is a second incident involving a replacement employee named Carmine Rendaza, who testified for Respondent. He testified that on or about October 5, as he was coming to work, Blood called him a ''fucking scab,'' and said he was going to ''follow Rendaza home and fuck his wife.'' At the time of the incident, Blood was standing to the left side of Rendaza's car, on the driver's side, with the driver's window open about one-fourth inch. Blood bent over at the time of the remark, the better to have eye contact with Rendaza. The entire incident lasted a couple of seconds (Tr. 498).

During Rendaza's testimony, Blood and four other strikers were brought into the courtroom, but Rendaza was unable to identify Blood as the person making the remarks at issue. In fact, Rendaza testified (Tr. 496) he never saw the individual who made the remark again, after the incident. That Rendaza never saw the culprit again is curious, because Rendaza came to work at the same time each day after the incident, and Blood picketed during the same time on a regular basis.

Blood denied the incident in question. I note that Blood stands 6 feet 2 inches tall, weighs 180 pounds, wears glasses, and is 23 years old. Another picket named Jeffrey Schneider stands 6 feet 3 inches tall, weighs 250 pounds, also wears glasses, and is 32 years old. Schneider, along with Schrader, McClymont, and Steely were in the array of persons viewed by Rendaza in the courtroom.

Notwithstanding the fact that Rendaza reported the incident to Cook about 10 minutes after it happened and that Rendaza and Cook immediately went out to the picket line where Rendaza pointed out Blood to Cook, I am left on this record with a doubt that Blood made the remark attributed to him. To put it another way, I find that the General Counsel has proven that Blood did not engage in the misconduct in issue.

In the alternative, should it be found on appeal that the General Counsel did not meet his burden, I will also decide whether the misconduct attributed to Blood by Rendaza is serious enough to warrant discharge. I begin with the case of *NLRB v. Hartman Luggage Co*., 453 F.2d 178, 184 (6th Cir. 1971), where the court affirmed the Board's decision, on the following facts, that a striker was not disqualified from reinstatement. Two supervisors in a car on their way to work were blocked from entering the plant premises by a large body of pickets. The striker in question, Taylor, stepped up to the supervisors' car and told the supervisors that the strikers were mad at them, and were going to stay mad. Taylor then stated it would be a shame for the strikers to have to kill the supervisors who were too young to die, but it seemed like the strikers were going to be forced to.

The court (at 185) noted that the threat was made under circumstances which made it incredible that Taylor intended it literally, and the court regarded it as mere ''picket line rhetoric.'' There was no contention that Taylor committed acts of vandalism or violence.

Admittedly the *Hartman* decision predated *Clear Pine Mouldings*, 268 NLRB 1044 (1984), where the Board indicated it would look more closely at oral threats to replacement employees than it had in the past. Yet, I note that the *Hartman* case was cited with approval in a decision written long after *Clear Pine Mouldings*. See *Teledyne Industries v. NLRB*, 911 F.2d 1214, 1222 (6th Cir. 1990).

Under the current Board test taken from *Clear Pine Mouldings*, ''whether the miscount is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act,'' I find that even if it be found that the General Counsel failed to prove that Blood did not commit the acts in question, such acts were mere ''picket line rhetoric,'' not meant to be taken literally, and not having a reasonable tendency to coerce or intimidate employees.

In support of my conclusion, I note the following: Blood was accused of a single episode of making threats to nonstrikers. Compare *Gem Urethane Corp*., 284 NLRB 1349, 1353–1354 (1987), cited by Respondent. The alleged threat occurred as Rendaza was reporting to work and there is no evidence he changed his routine in coming to work or going home subsequent to the threats. Based on all the evidence, I find that Respondent violated Section 8(a)(3) in refusing to reinstate Blood.

### d. *Jeff Schneider*

Unlike the other strikers, the evidence presented with respect to Schneider is extensive and serious. Cook described reports from four replacement employees concerning Schneider. I find that based on these reports to Cook, Respondent had an honest belief that Schneider committed the acts attributed to him. Inasmuch as all four of the nonstrikers testified for Respondent, I turn to consider their testimony.

Eric Shakespeare, an auto technician, knew Schneider from a GM training school which both had attended about 3 months before the incident in question. This school with about 10 students, lasted for 4 weeks, 2 days per week. On October 3, about noon, Shakespeare left Respondent to walk to lunch when he encountered Schneider and another picket. The former called him a ''fucking scab.'' On his return from the restaurant, Shakespeare met the same two pickets. This time Schneider stated, ''Get a good look, because this time you're going to be fucking dead.'' Shakespeare reported the threat to Cook who made a note of it.

Replacement employee Vince Terry testified that on or about September 13 he was attempting to exit the Parkside driveway in a customer's car, when Schneider yelled, ''fucking scab, get the hell out of here.'' About 10 minutes later, Terry returned from his test run, and again Schneider was waiting. This time, while Schneider shook his picket sign with one hand, he shouted to Terry, ''fucking scab, why don't you stop your car and get out.'' About 2 months later, Schneider told Terry, who again was in a customer's car, ''if I ever see you on the street, I'm going to kick your ass.''

On October 3, replacement employee Bruce Salles was on his way to lunch when he approached Schneider and another picket, who briefly attempted to block his way. On his return, Schneider said to Salles, ''Tell you wife to suck my

dick.'' Later that day, as Salles' wife picked him up from work, Schneider yelled, ''we know where you live and we're going to get you. Get the fuck out of here.'' Subsequent to this last incident, Mrs. Salles refused to pick her husband up from work.

Paschell, whom I have found above to be less than completely reliable, testified to an incident in October. As Paschell was leaving Respondent in a vehicle, Schneider yelled to another picket to get Paschell's license plate number, so they could come after him.

Schneider worked for Respondent for 10 years prior to the strike. In his testimony, he denied the charges of misconduct described by the four witnesses above. Further, he stated he followed the Union's rules of conduct (R. Exhs. 2, 3, 4, and 5) because ultimately he desired his job back.

In this case, I credit Respondent's four witnesses and discredit Schneider. Without extensive discussion or citation of authority, I find that the cumulative effect of the incidents recited by Respondent's witnesses provides more than sufficient evidence to justify Schnieder's discharge, which I find did not violate the Act. *Gem Urethane Corp*., supra, 284 NLRB 1349 at 1353. Accordingly, I will recommend to the Board that this allegation be dismissed.

3. Does the record show disparate treatment with respect to respondent's decision to terminate the strikers

In *Aztec Bus Lines*, 289 NLRB 1021 (1988), the Board made clear its view that if the struck employer disciplines nonstriking employees differently, i.e., more leniently, than strikers, such disparate treatment will serve to immunize equivalent misconduct by strikers which would otherwise be adequate to support a discharge.

In the instant case, I have noted certain misconduct of Paschell, but there is no evidence the Employer was aware of it. Therefore, it is of no help to Schneider here. See *Aztec Bus Lines*, supra, citing *Garrett Railroad Car & Equipment v. NLRB*, 683 F.2d 731, 740 (3d Cir. 1982).

Charging Party also directs my attention to two other incidents: one involving a striker named Carlos who at one point said to Shakespeare, ''I hope you don't have a family, because we are going to get you.'' The parties later stipulated that on December 14, Carlos Samayoa (apparently the ''Carlos'' to whom Shakespeare referred), was sent a letter by Respondent, signed by Cook, stating that Samayoa was put on a preferential hiring list, there being no positions available at the time (Tr. 373).

In addition, there is an allegation that striker George McClymont threatened to beat up an unidentified replacement employee driving through the N. Main Street exit. This raw allegation was contained in a letter from a Respondent attorney to Charging Party's attorney (G.C. Exh. 2, p. 3). McClymont is now back to work.

Cook explained that he didn't follow up on Samayoa because Shakespeare was not certain about his identification and because Samayoa disappeared from the picket line shortly after the alleged incident and he did not testify at hearing. McClymont did testify for the General Counsel, but not about the subject raised here.

The disparate treatment issue applies to the treatment of strikers versus nonstrikers, not to the treatment of some strikers versus certain other strikers. Rather, Charging Party is raising an issue of condonation. Where acts of misconduct are involved, an employer does not waive or condone the misconduct of all participants when it rehires some of them. *Longview Furniture Co*., 100 NLRB 301, 306 (1952).

As noted by Judge Gerald A. Wacknov in *Fibreboard Corp*., 283 NLRB 1093, 1098 (1987): ''The law is clear that condonation of unprotected activity is not to be readily inferred, but rather must be based on clear, convincing, and positive evidence that the employer has agreed to forgive such misconduct and desires to continue the employer-employee relationship as though no misconduct had occurred.''

In sum, I find no credible evidence that Respondent knew of Paschell's misconduct, or that Samayoa or McClymont engaged in any serious misconduct which Respondent later condoned.

## CONCLUSIONS OF LAW

1. Respondent Wayne Stead Cadillac, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions, Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers, AFL–CIO and Teamsters, General Truck Drivers and Helpers, No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act on December 14, 1989, by discharging, and thereby refusing immediately to reinstate Jerry Schrader, Terry Steely, and Eric Blood on their unconditional offer to return to work.

4. The Respondent did not violate Section 8(a)(3) and (1) of the Act on December 14, 1989, by discharging Jeff Schneider.

5. The above unfair labor practices are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Jerry Schrader, Terry Steely, and Eric Blood, I shall recommend that Respondent be required to offer them reinstatement to their former positions, discharging, if necessary, persons hired after December 14, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay from December 27,[9] until a bonafide offer of reinstatement is tendered shall be computed as set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Reinstatement shall not be recommended in the case of Jeff Schneider.

All backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), with in-

[9] This date was reached by agreement of the parties (Tr. 95).

terest as authorized in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

## ORDER

The Respondent, Wayne Stead Cadillac, Inc., Walnut Creek, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging employees from engaging in union activity, by discharging and refusing to reinstate strikers, or in any other manner discriminating with respect to their wages, hours, or terms and conditions and tenure of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jerry Schrader, Terry Steely, and Eric Blood immediate reinstatement and make them whole for losses sustained by reason of the discrimination against them, with interest, as set forth in the remedy section of this decision.

(b) Expunge from its files and records all references to the discharges of Jerry Schrader, Terry Steely, and Eric Blood, and notify them that evidence of their unlawful terminations will not be used as a basis for future personnel actions.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Walnut Creek, California, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage employees from engaging in union activity, by discharging strikers, or in any other manner discriminating with respect to their wages, hours, or terms and conditions and tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Jerry Schrader, Terry Steely, and Eric Blood immediate reinstatement to their former positions, and make them whole for losses sustained by reason of the discrimination against them, with interest, as set forth in the remedy section of this decision.

WE WILL expunge from our files any reference to the discharges of Jerry Schrader, Terry Steely, and Eric Blood and WE WILL notify them that evidence of these unlawful terminations will not be used as a basis for future personnel actions.

WAYNE STEAD CADILLAC, INC.